

July/August 2013

The Bencher[®]

THE MAGAZINE OF THE AMERICAN INNS OF COURT[®]



DEALING WITH DIFFICULT

Judges, Lawyers, AND Clients

www.innsforcourt.org





PHOTO CREDIT: © iStockphoto.com/Clerkenwell_images

Civility in the Practice of Law: How the Legal Profession Can Do Better

By Marlo Van Oorschot, Esquire

Civility is defined as something said or done in a formally polite way. In court, it is a professional obligation: ABA Model Rules, Rule of Professional Conduct 3.5 states that lawyers may not “engage in conduct intended to disrupt a tribunal,” with related commentary saying that lawyers and judges alike can “preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.” Yet many people involved in litigation know that civility at trial can be rare—for example, in emotional family law cases involving divorce and custody. A lack of civility among the lawyers, the parties, and the judges, too often makes issues in dispute unnecessarily difficult to solve.

Civility Between Lawyers

Civility between lawyers does not depreciate aggressiveness or vigorous advocacy. Each lawyer has an ethical obligation to zealously represent clients. Zealous means full of energy, effort and enthusiasm—not being uncivil, abrasive, rude, condescending or demeaning. Many lawyers in their efforts to be zealous become uncivil with each

other through personal attacks in oral and written communication. In 2011, the California Court of Appeal took incivility head-on in a family law case, *Marriage of Davenport*, 194 Cal. App. 4th 1507.

In this case, the court of appeal sternly reminded lawyers that free speech and zealous advocacy are no defense to a claim for sanctions due to a lawyer’s

uncivil behavior. The court warned that unnecessarily demeaning, accusatory, and personal attacks contained in correspondence or pleadings serve no useful purpose in resolving disputed issues.

Practicing family law is difficult because of the high emotions of the clients, which in turn places high demands on each lawyer and on the court. But the same dynamic exists in other practice areas, as well, such as a contested will or a dispute between business partners. Thanks to movies and television, clients often believe a lawyer should be tough and nasty. Many clients want to use their lawyer to punish the other party and his or her lawyer, and too often many lawyers act accordingly. This turns civility into personal attacks. For the lawyer who is the target, to not respond in kind requires strong defenses against the uncivil, personal attack from opposing counsel or the other party.

Judges expect lawyers to confer on the issues in dispute, the exhibits to be used at trial, the presentation of witnesses and other relevant trial issues. Such cooperation is required, is in the best interests of all parties, and does not conflict with strong advocacy.

Lawyers who “need the business” should not treat colleagues poorly and make clients bear the cost of a longer and more contentious trial. A successful legal practice does not put economic interests over client interests.

Civility Between Parties

Lack of civility between parties is not unusual, but is often at a heightened state in intensely personal disputes. While high emotions are often understandable and expected, these intense levels of emotions between the parties ultimately mean financial and emotional devastation to the economic and emotional interests of the parties, their families, and careers—not to the lawyers.

The breakup of a business relationship or a marriage, or a wrongful death due to accident or negligence, typically evokes emotions similar to those caused by the death of a loved one outside the purview of litigation. To move past such a loss, each party must advance through the five stages of grief and loss: denial, anger, bargaining, sadness, and acceptance. Too many litigants remain in the anger stage and utilize the legal process to exert revenge on the other person. Unscrupulous lawyers take advantage of this by fueling litigation rather than helping clients move through the stages of grief and loss. While it can take years to successfully accept the personal loss that brought the parties to trial, it is critical that each party accept the reality of their situation so they can successfully transition to life after their

A lack of civility among the lawyers, the parties, and the judges, too often makes issues in dispute unnecessarily difficult to solve.

loss of relationship. To fixate on the legal process is expensive and damaging to everyone involved.

Lawyers should set the tone and show clients that conducting the case efficiently keeps them from spending their life’s savings on attorney’s fees. Efficiency, of course, depends on the issues and people involved, and litigation is sometimes necessary; but the majority of cases do not require going to trial.

The lawyer makes a living by spending time on a case and clients save money when that time is reduced. This can create conflict between the lawyer and the client. There is a fine balance between speed and an acceptable standard of care. In other words, a lawyer cannot commit malpractice by resolving a case too quickly simply because the client wants to avoid expense. But the client’s wish for prompt resolution should prevail. Lawyers should encourage angry clients who want to prolong litigation to consult a therapist who can help them accept the stages of grief and focus on the future.

Civility Between Lawyers and Judges

If incivility between lawyers or between parties prevents agreement, the judge will ultimately render a decision. That is why most lawyers strive to have a positive relationship with judicial officers, but judges themselves can obstruct the positive nature of the relationship between the bench and bar.

The Commission of Judicial Performance in California is responsible for addressing misconduct by judges, subject to review by the California Supreme Court. Case law shows that it takes extreme conduct by a judge to face disciplinary charges and potential removal from the bench. *In re Rasmussen* (1987) and *Oberholzer v. Commission on Judicial Performance* (1999) involve extreme judicial conduct as considered by the Supreme Court. While extreme situations are rare, lesser misconduct occurs daily throughout the court system.

Incivility between the judge and the lawyer is a paradox because the judge controls the fate of the

Continued on the next page

The law is a profession only when we maintain professionalism. Courtesy and good faith are not inconsistent with a vigorous, authoritative position in court; we can be forthright advocates in the law while maintaining civility in legal practice.

parties and it is difficult to alter a negative dynamic between a judge and a lawyer. Rules of professional conduct prevent the judge and the lawyer from discussing their differences and bind the judge to decide based on law rather than emotion, yet lawyers and judges who interact negatively cannot avoid each other during litigation. Therefore, the lawyer must try to alter the dynamic because the lawyer and client are literally at the mercy of the judge.

Most lawyers are professional, deferential, and respectful toward judges but something may occur to turn the judge against the lawyer. The judge may feel that the lawyer's appearance, courtroom demeanor, or lack of preparedness suggest disrespect toward the court. The judge may consider the lawyer's position on behalf of the client to be legally correct but morally or personally offensive. The lawyer's client, reputation in the community or interaction with the courtroom staff may offend the judge. When differences arise and the case cannot be re-assigned to another courtroom, the lawyer must find a way to work with a judge whose hostility is obvious.

Sometimes judges cannot set aside their feelings about a lawyer and make decisions based upon the law. The judge's tone of voice, facial expressions, or gestures may make his or her dislike of a lawyer clear. Even if this does not affect the judge's decision, such negativity can make clients feel like they are being denied their day in court because their case seemingly is not being decided on the evidence. This is the real tragedy of incivility between the judge and the lawyer.

Lady Justice is typically depicted wearing a blindfold that represents judicial objectivity and impartiality. In family law, justice—meaning the final decision—is dispensed by a judge, not a jury. A judge's impartiality alters justice and undermines public confidence in the judicial system. The Advisory Committee Commentary to the California Code of Judicial Ethics states the following relevant comments:

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges....Although judges should be independent, they must comply with the law and the provisions of this Code. ...[V]iolations of this Code diminish public confidence in the judiciary and thereby do injury to the system of government under law.

...A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly.

Lawyers may expect hostility from opponents or between parties. Among the tools to minimize or eliminate this hostility should be the assistance of an impartial and non-hostile judge. Lawyers faced with a hostile judicial officer can only try to encourage judges to remember they owe a duty to our clients—the public—to dispense justice impartially and objectively regardless of their personal feelings.

Civility and Professionalism

In the practice of law we should remember that we are dealing with human lives. Our goals should be to bring a sense of order to troubled situations, to communicate honestly and directly about the legal and human difficulties involved, and to maintain full respect for everyone with whom we deal. The law is a profession only when we maintain professionalism. Courtesy and good faith are not inconsistent with a vigorous, authoritative position in court; we can be forthright advocates in the law while maintaining civility in legal practice. ♦

Marlo Van Oorschot, Esq., is a respected, AV® Preeminent™, Los Angeles-based family law attorney who for nearly 20 years has focused her practice on resolving divorce, child custody, child and spousal support, and property disputes. Ms. Van Oorschot is the author of How to Survive Grey Divorce: What You Need to Know about Divorce After 50.

© **MARLO VAN OORSCHOT, ESQUIRE.** This article, used with permission from the American Inns of Court and Marlo Van Oorschot, Esquire, was originally published in the July/August 2013 issue of *The Bench*, a bi-monthly publication of the American Inns of Court. This article, in full or in part, may not be copied, reprinted, distributed, or stored electronically in any form without the express written consent of the American Inns of Court.